JUN 23 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,
Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BENJAMIN ORTIZ,
PEDRO M. PORRATA,
CHARLES CUPRILL,
Counsel for Petitioner.

INDEX

	Page
Petition	1
Basis of This Court's Jurisdiction	1
Statement of Matter Involved	1
Questions Presented	5
Reasons for Granting the Writ	7
Prayer	8

Brief:

Point One—The trial court found on the hearing on remand that "the defendant company when it sold molasses during the base period from April 10 to May 10, 1942, did not take into consideration the quantities sold in fixing the price. The defendant's company did not grant rebates or quantity discounts. Defendant's maximum price, under the Maximum Price Regulation, was, therefore, 17 cents. The Circuit accepted this view (see opinion). This being the case, it is now definitely established, that the sale of the molasses on March 3, 1944 was done in good faith, pursuant to a regulation of the Office of Price Administration, and therefore, the United States District Court for the District of Puerto Rico, lacks jurisdiction or power to hold defendant liable for damages or penalties under section 205 (d) of the Emergency Price Control Act, 50 USCA 405, and notwithstanding the subsequent amendments 32 and 45 to the R.M.P.R., under which regulation the defendant entered into the agreement to sell and deliver | 9 |
Preliminary Statement of Facts	10
Argument	12
I. It is our contention that the finding of the District Court as to compliance by defendant with the R.M.P.R. and its adjudication of penalties for violation of the sub-	

Page

sequent amendments to said R.M.P.R. raises before this Court now the paramount and fundamental legal question as to whether, under section 205 (d) of the Emergency Price Control Act, the imposition of damages and penalties against defendant is authorized by the statute 12

II. An analysis of the R.M.P.R., as it provided at the time of the contract (March 3, 1944) and the effect of the two subsequent amendments (of May 9, 1944 and August 2, 1944) upon the original regulation, will help to bring into the limelight the force of defendant's contentions in this case 14

III. Delivery at 17 cents became illegal only if any weight is given in this case to the subsequent amendments by the OPA of the regulations under which defendant acted 14

IV. Distinction between an agreement under a regulation and one entered before no regulation exists. 15

V. This point relating to the lack of power to impose damages or penalties affects the first and second judgments 17

VI. The grounds are now clear for a decision upon the applicability of section 205 (d) to both, the first and the second judgment, as anything said in the first appeal was lacking in the fundamentals necessary for a complete and final determination 18

Page

VII. The situation under the 1946 amendment tends to give color to point raised herein 19

Point Two—Defendant also contends that the court below committed error in not deciding that appellant had established the Chandler defense in this case and in not exercising its discretion in favor of appellant 22

Prayer 22

TABLE OF CASES

Crary v. *Porter*, 157 Fed. 2d 410 15

Porter v. *Bledsoe*, 159 Fed. 2d 495 16

Foster & Co. v. *Bowles*, Em. App. 1944, 144 Fed. 2d 870 17

Seagraves v. *Wallace*, 69 F. 2d 163 18

Scheffler v. *Bowles*, 153 F. 2d 4 20

FEDERAL AND LOCAL STATUTES

Sec. 205 (d) Emergency Price Control Act, 50 USCA 405 ..... 5, 6, 7, 12, 13

Section 205 (e) Emergency Price Control Act 5

UNITED STATES SUPREME COURT

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,
Defendant-Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
Plaintiff-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the United States:

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347 (a). Judgment entered by the Circuit Court on March 25, 1949.

Statement of Matter Involved

The action originating this petition was filed on Dec. 20, 1944 by the Price Administrator, under Section 205 (e)

of the Emergency Price Control Act of 1942. (50 U. S. C. A. App. 925 (e).)

On March 3, 1944, the defendant entered into a contract with Destilería Serrallés, Inc. to sell 1,250,000 gallons of cane blackstrap molasses at a price of 17 cents per gallon. (Plaintiff Exhibit A, OR. R. 103, 13).

The sale was made in compliance with the General Maximum Price Regulation 183, *prevailing at the time of the sale.* (R. 76, and Circuit Court Op. 4-5).

On the first trial before the U. S. District Court for Puerto Rico, Judge Cooper accepted defendant's view that delivery of the molasses was to take place upon the deposit of said molasses in a tank at a distance of 2 miles from defendant's place of business and awarded damages for 12,309.86 in regard to all molasses delivered after May 9, 1944. The District Court also held at that time that defendant had only one kind of purchaser. (OR. R. 134-143).

The judgment of the District Court was reversed by the Circuit, which, among other things, expresses itself as follows:

> *"Moreover, the court in our view misinterpreted the term "purchaser of the same class" appearing in the General Maximum Price Regulation.* This was important since, *when the contract was executed, that regulation was in effect,* and defendant's pricing in the contract, as measured against it, would be an important factor to be considered in exercising judicial discretion. There was uncontradicted evidence that Mr. Mandry, defendant's acting manager, who signed the contract on its behalf, knew that the General Maximum Price Regulation set the maximum price as that charged during the base period to each class of purchasers. During the base period defendant had made deliveries under a contract for the sale of 1,800,000 gallons of molasses at 13 cents per gallon. Dur-

ing that period defendant also sold and delivered 7 lots of molasses ranging from 50 to 7,300 gallons of molasses to 7 individual purchasers at 17 cents per gallon. The court found that the quantity purchaser bought for resale, the others for their own consumption. *On the findings the court determined that the class of the purchaser should be decided by "the use of the commodity".* This classification placed Serrallés, who bought the molasses for use in its distillery, in the same class as the small purchasers in the base period. *Sec. 1499.20 (k), 7 F. R. 3156, of the General Maximum Price Regulations defines the words "purchaser of the same class" as referring to "the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers". The criterion is therefore defendant's business practice.* As to this the purchaser's use can conceivably be an evidential, but not an ultimate, factor. The evidence here introduced would suggest that defendant did allow quantity discounts; but we do not decide that point, since evaluation of the evidence is for the district court. *"We think therefore that the case should also be remanded to allow the district court to reconsider its award of damages in accordance with the view here expressed."* (Italics ours.)

On the second hearing before the District Court, the said court reiterated its finding that defendant did not take into consideration the quantities sold in fixing the price and did not grant rebates or quantity discounts (R. 76), but Judge Chaves, then presiding, imposed penalties, against defendant in addition to the overcharge, in the sum of 21,250.68 "for having willfully violated *amendments No. 32 and 45 to the Revised Maximum Price Regulation No. 183",* but ignored the fact that defendant complied with the regulation as it existed at the time of the sale.

On the second appeal, and in regard to the compliance with the then existing regulation, the Circuit Court concluded as follows:

> True, we did suggest, 163 F. 2d 303, 309, *that the original contract may itself have been illegal, as in excess of charges made by defendant during the base period;* and this point has now been removed from the case by the finding of the district court *that defendant "did not grant rebates or quantity discounts" during the base period.* The effect of this finding *is to establish the legality of the contract when originally made,* since it means that the contract price of 17 cents a gallon *was then the correct one for purchasers for consumption, even though they purchased in such large amounts as were here involved.* But this does not reach our conclusion that a delivery illegal under the regulations in force at the time it is made is not thereby validated under 205 (d) *merely by reason of the fact that it is in fulfillment of a contract of sale valid when made* (Italics ours).

(We might suggest right here in a parenthesis that what defendant violated according to Judge Chaves was Amendments 32 and 45 to the regulations under which defendant had already made a valid sale.)

Also appears from the record that prior to the execution of the contract, defendant, through both its attorney and acting manager, made oral and written inquiry at the Office of the Regional Administration of the Office of Price Administration in San Juan concerning the ceiling price applicable to the sale (First R. 98-9, 73-4, Pltf. Ex. 4-A, B-24-5) and under date February 29, 1944, was advised in writing that *"the present ceiling price of molasses is the highest price charged during the base period, April 10-May, 1942, to each class of purchaser"* (Pltf. Ex. 4-B, R. 26.)

The facts of this case, we submit, require the issuance of a writ of certiorari under Rule 38, paragraph 3 to review the application given by the Circuit Court to the facts of this case, of Section 205 (d) of the Emergency Price Control Act, which section reads as follows:

> "No person shall be *held liable for damages or penalties in any Federal, State or Territorial Court* on any ground for or in respect of anything done in good faith pursuant to any provision of this Act or *any regulation, order, price schedule, requirement or agreement thereunder,* or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Price Administration and Civilian Supply, *notwithstanding that subsequently such provision, regulation, order, price schedule, requirement are determined to be invalid*". (Italics ours.)

Also section 205 (e) of the Act as amended, effective July 25, 1946, 60 Stat. 676, 677, which reads as follows:

> "The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same.
>
> (1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration.

Questions Presented

1. Under Section 205 (d) a subsequent amendment to a regulation pursuant to which a seller makes a contract, can be of no avail to the government in any court of the United States in a suit for damages or penalties against such seller, who incurred in liabilities and acquires

rights in good faith pursuant to and in compliance with the regulation as then prevailing.

2. There is an obvious distinction between a contract or agreement under a regulation or price schedule, etc. and a contract or agreement entered into in anticipation of regulation. Section 205 (d) does not protect a contract in anticipation of regulation. It protects only agreements, made or entered in compliance or pursuant to an already existing regulation; undoubtedly under the theory that a regulation is an equivalent to an order or authorization from the government given to all sellers, while contracts entered in anticipation of regulation do not enjoy the sanction or guarantee of such government order.

3. An OPA regulation is an equivalent to a law: in Section 205 (d) Congress *protected the person acting according to law.* The Circuit Court, therefore, in not protecting defendant, disregarded an obvious command of Congress and committed error.

4. The term "agreement thereunder", used in Section 205 (d) qualifies, the term "any regulation", "order", "price schedule", or "requirement" *and means an agreement under a regulation as well as an agreement under an order or price schedule.* The Circuit Court, therefore, in limiting the meaning of "agreement thereunder" *to agreement under the terms of the Act, violated* the principle that where the law makes no distinction, the Court can not make any.

5. Section 205 (d) represents a specific exception to the general coverage of the statute, originating in the principle that no person should be penalized for acting according to law, and the Circuit Court committed error in not treating section 205 (d) as an exception.

6. It also must be plain that if the circuit is correct and section 205 (d) protects action under regulation, it must also

be understood as protecting a contract made in compliance thereto.

Reasons for Granting the Writ

Section 205 (d) has not been interpreted by this Court. As applied by the Circuit in this case, the Court denies to defendant the benefit of the specific exception established by the statute that "no person shall be held liable for damages or penalties in any Federal, State or Territorial Court, on any grounds . . . for . . . anything done or omitted to be done in good faith pursuant . . . to any regulation, order, etc. . . . *or agreement thereunder . . . notwithstanding that subsequently such provision, regulation, order, price schedule, requirement or agreement may be modified, rescinded or determined to be invalid.*"

The holding of the Circuit tends to ignore that what defendant is being held as violating, according to the findings of the District Court, was not a regulation but amendments Nos. 32 and 45 to the Maximum Price Regulation No. 183 (R. 78); that defendant did not act in anticipation of regulation *but according to the regulation prevailing at the time of the sale* and that it is to protect special cases like this that section 205 (d) was enacted.

The ignoring of section 205 (d) or the limitation imposed upon its meaning by the Court below, represents error from either one of three important points of view:

A. The point of view of an obvious misinterpretation of a Federal Statute not yet interpreted by this Court.

B. The point of view as to the power of any court of the United States to disregard the plain meaning of an act of Congress.

C. The point of view of penalizing a person for acting according to law and on the basis of subsequent amendments that the government, which in this case is the other

party, may promulgate; the government being the one to be benefited out of any violation that may be imputed and arising out of the natural confusion caused by amendments not altogether clear as shown by the fact that courts conflict about their meaning.

It is also believed that in the amendment of July 25, 1946, (ante, page 5), Congress manifested an intention to liberalize the Statute to take care of situations as the one presented by this case, and that the court in this case insists in applying the statute contrary to the wish of Congress, penalizing the seller for action taken in compliance with regulation and instructions from OPA.

Prayer

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this court to the United States Circuit Court of Appeals for the First Circuit and that the duly certified copy of the transcript of proceedings below which accompanies the petition herein shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the judgment and decision of the Circuit Court of Appeals may be reversed; and that your petitioner may be granted such other and further relief as may be proper.

Ponce, Puerto Rico, this 21st day of June, 1949.

Respectfully submitted,

BENJAMIN ORTIZ,
PEDRO M. PORRATA,
CHARLES CUPRILL,
Attorneys for Defendant-Petitioner,
Mario Mercado e Hijos,
Box 1224-Ponce, Puerto Rico,
Concordia esq, Luna, Ponce, P.R.
By PEDRO M. PORRATA.

SUPREME COURT OF THE UNITED STATES

MARIO MERCADO E HIJOS,
Defendant-Petitioner,

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
Plaintiff-Respondent

BRIEF IN SUPPORT OF PETITION

POINT ONE:

The trial court found on the hearing on remand that "the defendant company when it sold molasses during the base period from April 10 to May 10, 1942, did not take into consideration the quantities sold in fixing the price. The defendant company did not grant rebates or quantity discounts." Defendant's maximum price, under the Maximum Price Regulation, was, therefore, 17 cents. The Circuit accepted this view (see opinion). This being the case, it is now definitely established, that the sale of the molasses on March 3, 1944 was done in good faith, pursuant to a regulation of the Office of Price Administration and, therefore, the United States District Court for the District of Puerto Rico, lacks jurisdiction or power to hold defendant liable for damages or penalties under section 205 (d) of the Emergency Price Control Act, 50 U. S. C. A. 405, and notwithstanding the subsequent amendments 32 and 45 to the R. M. P. R., under which regulation the defendant entered into the agreement to sell and deliver.

Preliminary Statement of Facts

Let us examine first the Opinion of the Circuit Court remanding this case after the first trial to the lower court.

I. In remanding this case to the District Court, the Circuit, after stating that the lower court misinterpreted the term "purchasers of the same class," appearing in the Maximum Price Regulation (prevailing at the time of the sale on March 3, 1944), classified as important the proper interpretation of that point in this case and proceeded to authorize or suggest the reception of evidence on the question of compliance by defendant with the said Maximum Price Regulation. The court expresses itself as shown in the Petition, ante pages 2-3.

II. In obedience to the mandate of the Circuit, the District Court proceeded to receive evidence on the question of compliance by defendant with the R. M. P. R. and concluded, as a matter of fact, that defendant company did not take into consideration the quantity sold in fixing the price for its molasses and that it did not grant rebates or quantity discounts. The conclusions of the District Court upon this question are embodied in findings XVII, XXI and XXIII, which read as follows:

> "XVII. That at the time that the contract was executed between defendant and Destileria Serralles on March 3, 1944, Mr. Felix Hilera, inquired of defendant as to his base period price and Mr. Mandry told Mr. Hilera *that he had verified with the Office of Price Administration that the OPA price was 17 cents per gallon.*" (Italics ours.)

> "XXI. That during the base period April 10 to May 10, 1942, defendant sold and delivered 7 lots of molasses to 7 individual purchasers at *17 cents per gallon.*" (Italics ours.)

"XXIII. That the defendant company when it sold molasses during the base period from April 10 to May 10, 1942 *did not take into consideration the quantities sold in fixing the price. The defendant company did not grant rebates or quantity discounts.*" (Record, p. 76.) (Italics ours.)

These findings were approved by the Circuit. (See quotation from Opinion, Petition ante, page 4).

After concluding as shown in the findings quoted ante, that defendant had made his contract in agreement and conformity with the price authorized by the R. M. P. R. then prevailing, the District Court, in its judgment, proceeded nevertheless to charge defendant with violation *of amendments 32 and 45 to the R. M. P. R.*, under which the contract was made; as follows:

"It is further ordered, adjudged and decreed, that pursuant to the Findings of Fact and Conclusions of Law filed herein, the defendant pay to the plaintiff an additional sum of $21,250.68 *for having willfully violated Amendments No. 32 and No. 45 to Revised Maximum Price Regulation No. 183,* and for having failed to take practicable precautions against the occurrence of said violations." (Italics ours.)

III. It is, therefore, definitely established in this case, that at the moment the contract of March 3, 1944 was made, defendant complied with the R. M. P. R. No. 183 as then prevailing, but that, in the conclusion of the District Court, *defendant violated amendments 32 and 45 of May 9, 1944 and August 2, 1944,* respectively, to the said R. M. P. R. Defendant, for the purpose of this point, complied with the regulations as it existed at the time of the contract, and according to the Court, *violated the subsequent amendments No. 32 and No. 45 to said R. M. P. R., pursuant to which, the agreement was entered into.* This alleged violation of the two subsequent amendments, 32 and 45 (not existing at the

time of the contract) to the R. M. P. R. under which the contract was entered into on March 3, 1944, while carrying out the terms of the legal agreement, is the reason why defendant is being penalized, first with the sum of $42,501.36, and, then with the additional sum of $21,250.68, imposed by the District Court on the second trial.

ARGUMENT

I. It is our contention that the finding of the District Court as to compliance by defendant with the R.M.P.R. and its adjudication of penalties for violation of the subsequent amendments to said R.M.P.R. raises before this Court now the paramount and fundamental legal question as to whether, under section 205 (d) of the Emergency Price Control Act, the imposition of damages and penalties against defendant is authorized by the statute.

Section 205 (d) provides that *no person shall be held liable for damages or penalties on any grounds for or in respect to anything done or omitted to be done in good faith pursuant to any provision of this Act, or any regulation, order, price schedule, requirement or agreement thereunder,* notwithstanding that subsequently such provision, regulation, order, price schedule, requirement or agreement, *may be rescinded, modified or determined to be invalid.*

The exact wording of Section 205 (d) is as follows:

> "No person shall be held liable for damages or penalties in any Federal, State or Territorial Court, on any grounds for *or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement or agreement thereunder,* or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Price Administration and Civilian Supply, *notwith-*

standing that subsequently such provision, regulation, order, price schedule, requirement or agreement may be modified, rescinded or determined to be invalid." (Italics ours.)

Section 205 (d), therefore, represents an order to the courts or a bar upon their jurisdiction, not to penalize a seller for anything done pursuant to an agreement in conformity with and under a regulation prevailing at the time of the sale. In other words: obligations incurred or rights acquired pursuant to or in accordance to a regulation, cannot be used by the government, or by the buyer, to file a suit for damages or penalties against the seller "*in any Federal, State or Territorial court*". An injunction may probably be filed, but not a suit for damages or penalties.

Can it possibly be said that the subsequent amendments 32 of May 9, 1944, and 45 of August 2, 1944 to the R. M. P. R., enacted, *the first one over two months and the second one about five months after the contract of sale was effective,* avail the government with a cause of action for damages or penalties against defendant? It clearly cannot, because section 205 (d) provides that "no person can be held liable for damages or penalties . . . in respect to anything done or omitted to be done under a regulation . . . or agreement thereunder," *notwithstanding that subsequently such regulation, provision or order, price schedule, requirement or agreement may be rescinded, modified or determined to be invalid.*" That is to say: for the purpose of a claim for damages or penalties in a Federal court under this Act, a subsequent amendment to a regulation under which an agreement was entered into cannot be used by the Government in any action for damages or penalties against the seller.

II. An analysis of the R.M.P.R., as it provided at the time of the contract (March 3, 1944) and the effect of the two subsequent amendments (of May 9, 1944 and August 2, 1944) upon the original regulation, will help to bring into the limelight the force of defendant's contentions in this case.

The R. M. P. R. provided that the seller's maximum price for any commodity "shall be, in those cases in which the seller dealt in the same commodity during the period from April 10, 1942 to May 10, 1942, the highest price charged by the seller during such period for the same commodity to a purchaser of the same class."

Amendment 32 to said R. M. P. R. provided that, on or after May 9, 1944, the maximum price for molasses shall be 13.6 cents per gallon delivered at the mill and amendment 45 to that same regulation provided that 13.6 cents per gallon was for molasses delivered at the mill or at the mill tank.

III. Delivery at 17 cents became illegal only if any weight is given in this case to the subsequent amendments by the OPA of the regulations under which defendant acted.

It is patent, therefore, that delivery under the contract of March 3, 1944 (original record, p. 103) at 17 cents was found illegal only because of the subsequent amendments 32 and 45 to the R. M. P. R.; amendments not existing at the time when the agreement was entered into. To hold that such subsequent amendments can be of any avail to the government in any court of the United States, in a suit for damages or penalties, runs counter and violently conflicts with the obvious purpose and implied equity of section 205 (d) of the Emergency Price Control Act, which does not allow the imposition of damages or penalties on the

basis of a subsequent amendment to a regulation *complied with by the seller at the time of the agreement.*

IV. Distinction between an agreement under a regulation and one entered before no regulation exists.

It will further help to understand defendant's contentions, the obvious distinction between a contract or agreement in anticipation of regulation and a contract or agreement under a regulation or price schedule, etc. . . . Section 205 (d) does not protect a contract entered into before regulation was established. *It protects only agreements made or entered into in compliance or pursuant to regulation. Crary* v. *Porter,* 157 Fed. 2d 410. This, undoubtedly, under the theory that a regulation is equivalent to an order or authorization from the government given to all sellers; while contracts in anticipation of regulation do not enjoy the sanction or guaranty of such order. Furthermore, regulation implies that the government already examined the pricing situation and considered agreeable to public interest the ceiling price accorded therein, while the price agreed to in a contract previous to regulation, answers only to the private interest and criteria of the contracting parties.

CRARY v. PORTER, 157 Fed. 2d 410, at p. 413.

"It is argued that section 205 (d) of the Act, 50 USCA, Appendix, 925 (d) exempts a seller from liability for violating a price regulation, if he has acted in good faith. Appellants have misread the language and purpose of this section of the statute. The section provides that "no person shall be held liable for damages or penalties . . . on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder . . . notwithstanding that subsequently such provision, regulation, order, price schedule, re-

quirement or agreement may be modified, rescinded or determined to be invalid. . . . Clearly, this provision has application only to things done pursuant to or in conformity with the Emergency Price Control Act and not to things done contrary to or in violation of it, whether in good faith or bad faith. As the report of the Senate Committee on Currency and Banking declared, Sen. Rep. 931, 77th Cong. 2d Sess., at the time the statute was enacted, "of course Section 205 (d) *does not confer any immunity upon any person who violates any such provision, regulation, order or requirement.*" See also Bowles *v.* Indianapolis Glove Co., 7 Cir. 150 F. 2d 597, 600; Bowles *v.* Franceschini, 1 Cir. 150 F. 2d 510, 512-514; Scheffler *v.* Bowles, 10 Cir. 153 F. 2d 1, 4. (Italics ours.)

PORTER v. BLEDSOE, 159 F. 2d 495, at 498.

"(4) Nor may defendants find refuge in Section 205(d) of the Act, 50 USCA, Appendix 925 (d) for clearly the reference in good faith therein *has application only to acts done pursuant to or in conformity with some provision of the Emergency Price Control Act which may have been modified, rescinded or held to be invalid.* The provision does not relate to acts in derogation of the statute. See report of the Senate Committee on Currency and Banking, Sen. Rep. No. 931, 77th Cong. 2d Sess. (1942) stating at the time the statute was enacted: . . ."of course Section 205 (d) *does not confer any immunity upon any person who violates any such provision, regulation, order or requirement.*" See also Crary *v.* Porter, 8 Cir., 157 Fed. 2d 410, Scheffler *v.* Bowles, 10 Cir., 153 Fed. 2d 1. (Italics ours.)

Applying this principle to the agreement of sale in this case, the price charged by defendant as found by the lower court, was the price authorized by regulation. It derived, therefore, from the ideas and thinking of the government embodied in the regulation. Congress in Section 205(d)

protected the carrying out of the contractual agreement under the powerful principle that the contract price, being authorized by law, the government is not entitled to avail itself of a subsequent amendment in a suit for damages or penalties.

Ours is not a case as to whether the Administrator has power to change a regulation. The Administrator obviously has power to do so. *Foster & Co.* v. *Bowles,* Em. App. 1944, 144 Fed. 2d 870. It is a case as to whether the government can sue *a person who entered into an agreement under a regulation for carrying out the obligations or exercising the rights acquired under it.* The words "or agreement thereunder" are crucial under the statute. It is not less crucial and illuminating that the statute specifically provides that no subsequent modification of a regulation can be used by the government or by the buyer to sue the seller for damages or penalties in any court of the United States.

V. This point relating to the lack of power to impose damages or penalties affects the first and second judgments.

The point presented and discussed hereinbefore, is material, both, in regard to the imposition of the $21,250.68 penalty, as well as in regard to the $42,501.36, involved in the previous appeal, and, with due respect to contrary opinion, the finding made by the District Court of compliance with the R.M.P.R. requires a reversal of both judgments.

When this case was before the Circuit on the first appeal, the court decided to order a reinvestigation as to whether defendant, when entering into the contract of March 3, 1944, violated the R.M.P.R. It ruled that the lower court had misinterpreted the term "purchaser of the same class" used in the R.M.P.R. (See Petition ante, p. 2). The District Court reinvestigated this question on remand and

reached the conclusion that during the base period defendant made no distinction as to classes of purchasers: (ante p. 10); which means that defendant complied with the R.M.P.R. at the time of entering into the agreement to sell and deliver on March 3, 1944, and what defendant violated, according to the District Court and as shown heretofore, were admendments 32 and 45 by exercising the right to deliver at 17 cents acquired in the perfectly valid contract of March 3, 1944.

VI The grounds are now clear for a decision upon the applicability of section 205 (d) to both, the first and the second judgment, as anything said in the first appeal was lacking in the fundamentals necessary for a complete and final determination.

We now know that the contract was made in good faith under and pursuant to the R.M.P.R.; we now know that the R.M.P.R. was subsequently amended by amendments 32 and 45; that the delivery made at the agreed price did not violate the regulation under which the agreement was entered into, and that liability can only be predicated for the alleged violation of subsequent modifications of the regulation under which the agreement was made (Findings XVII, XXI and XXIII quoted ante, and also judgment of court below, quoted at page 11 of this brief).

With the facts that the District Court found, which were not before the Circuit in the previous appeal or before this Court in the previous petition, this Court is now in a position to apply the principle of *Seagraves* v. *Wallace*, 69 F. 2d 163, Cert. and Rehearing Denied, 293 U. S. 569, and 293 U. S. 630, to the effect of reversing both judgments. In the *Seagraves* case, the Court expresses itself thus:

> "An appellate court, so long as it has jurisdiction over the controversy, ought to have power to do justice according to law, and should be more ready to cor-

rect its own previous error, if such clearly appears, than to correct the errors of the District Court. Justice is better than consistency. The court is not bound at the will of litigants to revise its previous holdings, *but when itself convinced that it should, it can.* It may be said not stare decisis but fiat justitia, ruat coelum. *Johnson* v. *Cadillac Motor Co.* (C.C.A.) 261 F. 878, 879; 8 A.L.R. 1023; Higgins *v.* California Prune & Apricot Grower (C.C.A.) 3 F (2d) 896; Luminous Unit Co. *v.* Freeman Sweet Co. (C.C.A.) 3 F. (2d) 577 (Italics ours).

VII. The situation under the 1946 amendment tends to give color to point raised herein.

In passing upon the question raised by us as to the baring of this suit by the 1946 amendment to section 205 (e), the Circuit Court stated:

> "Nor does the 1946 amendment to section 205 (e) bar the suit, because Besosa, on whose information defendant claimed reliance, was not one of the officials specified in that amendment as having power to prejudice the Administrator's right of suit."

Section 205 (e) as amended provides that if the Administrator has instituted action in those cases in which the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any Regional Administrator or District Director of the Office of Price Administration, the action shall be withdrawn (50 USCA App. Sec. 925 (e) p. 253).

Section 205 (e) as amended reads as follows:

> "The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same.
>
> (1) If the violation arose because the person selling the commodity acted upon and in accordance with the

written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; . . .

Scheffler v. *Bowles,* 153 F. 2d p. 4.

In that case, the court at page 4 stated:

"Actions taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the Act or of the regulation. "Appellants therefore could urge good faith as a defense only if they followed the law in obtaining the advice upon which they relied".

As the record shows, defendant, not only acted upon the written advice of Mr. Besosa, Price Manager of the Office of Price Administration, but while acting according to advice, also acted in accordance and conformity with the Maximum Price Regulation, *prevailing at the time of entering into the contract.*

And as shown by the wording quoted ante from the Opinion of the Circuit on the first appeal, the only reason given for the non-compliance of the 1946 amendment, was that Besosa was not one of the officials specified in the amendment as having power to prejudice the Administrator's right of suit. However, we must again invite the attention of this court, to the principle behind the said 1946 amendment, as the Government has not yet denied the power of Besosa to write in the name of the OPA and it seems to us inequitable that the government be allowed to permit a person to write in its name and then denied responsibility.

On the hearing on remand, attorney Porrata put a question to the learned counsel for the government as to whether the government would deny that Besosa had the right to write for the OPA. The government's counsel answer

to the question was substantially, that that issue had already been determined by the Appellate Court. Let us quote from the record:

Record, p. 24:

> Mr. Porrata: May I ask a question, Mr. Fike? Do you deny that Mr. Besosa had the right, for the OPA to write us what was the ceiling price of molasses on February 25, 1944? May I tell you that he was in charge of the Price Panel of Puerto Rico? And do you deny that he was empowered to write us giving us that information? May I call attention to the fact that at the time that question was raised here the Government did not deny that Mr. Besosa was entitled to write us that letter that appears on page 25, and 26 of the record, and the letter answering our letter in regard to maximum price here in Puerto Rico at that time?
>
> Mr. Fike: I don't think that I have to deny it. I think that counsel is confusing two issues. That issue has already been determined by the Appellate Court. It says so there in the opinion (R. 24).

It is true that the 1946 amendment requires that the advice and instructions be given by the Administrator or any Regional Administrator or District Director of the Office of Price Administration, but it cannot be denied that in practice the Administrator acts through different heads of the Department into which each Regional Office is divided, and in Puerto Rico, if Besosa was writing as to prices, and he was doing it without authority from the Administrator, when Besosa's letter was introduced by defendant in evidence showing instructions given by Besosa, using paper of the Office of Price Administration and signing himself as Food and Beverages Section, (Original Record, 25-26), the government should be considered at least as morally bound to explain the situation and show that it was not committing inequity.

In any way, this case as seen from the standpoint of the idea of Congress embodied in the 1946 amendment and in view of the findings of the court below, may properly be considered as one deserving a reversal of the present judgment of $21,250.68 and the vacating of the first one of $42,501.36 as dictated in violation of Section 206 (d) and (e) 50 USCA Sec. 925 (d) and (e).

POINT TWO

Defendant also contends that the court below committed error in not deciding that appellant had established the Chandler Defense in this case and in not exercising its discretion in favor of appellant but will not enlarge on this point preferring to rely, for the time being, on the point relating to the interpretation of Sections 205 (d) and 205 (e) as amended.

Prayer

Defendant prays that the Writ be issued and the case be reviewed by this Court.

Respectfully submitted,

BENJAMIN ORTIZ,
PEDRO M. PORRATA and
CHARLES CUPRILL,
Attorneys for Petitioner,
Box 1224—Ponce, P. R.,
Concordia esq. Luna-Ponce, P. R.